SUPREME COURT, U. S.
MAY 1968
JOHN F. DAVIS, CLERK

NO. [redacted] 85

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

WHITNEY STORES, INC., and
ROBERT H. JOHNSON,
Appellants

versus

T. KENNETH SUMMERFORD, Solicitor for the Twelfth Judicial Circuit of the State of South Carolina, E. A. McLEOD, Sheriff of Florence County, and T. E. Rogers, Jr., Magistrate,
Respondents

and

BELK'S DEPARTMENT STORE OF CAMDEN, SOUTH CAROLINA, INC., COLLINS DEPARTMENT STORES, INC., and SOUTH CAROLINA RETAIL COUNCIL, INC.,
Intervenor-Respondents

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES, FOR THE DISTRICT OF SOUTH CAROLINA, FLORENCE DIVISION

JURISDICTIONAL STATEMENT

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OPINION BELOW

The opinion of the United States District Court for the District of South Carolina, convened as a three judge Constitutional Court (App., infra, pp. 1a-12a) is reported at — F. Supp. —.

JURISDICTION

Appellants instituted this action in the District Court of the United States for the District of South Carolina seeking injunctive relief against a pattern of discriminatory enforcement of section 64-2 through 64-2.5 of the 1962 Code of Laws (as amended) of the State of South Carolina, and seeking a declaratory judgment that such code sections are unconstitutional. The statutes in question make it generally unlawful to engage in work on Sunday and prohibit the sale of certain items on Sunday. Judgment of the District Court (App., infra, pp. 1a-12a) was entered February 12, 1968, and notice of appeal was filed March 12, 1968, in the District Court of the United States for the District of South Carolina. This Court has jurisdiction of this appeal made under 28 U. S. C. sec. 1253. *St. John v. Wisconsin Employment Relations Bd.*, Wis. 1951, 71 S. Ct. 375, 340 U. S. 411, 95 L. Ed. 386. *U. S. v. Georgia Public Service Commission*, Ga. 1963, 83 S. Ct. 397, 371 U. S. 285, 9 L. Ed. (2d) 317.

STATUTE INVOLVED

The provisions of section 64-2 through 64-2.5 of the 1962 Code of Laws of South Carolina, as amended (1967 Supp.), are set forth in full as footnote three in the opinion of the court below and may be found in Appendix, infra, pp. 3a-5a.

QUESTIONS PRESENTED

Does section 64-2 through 64-2.5 of the 1962 Code of Laws of South Carolina, as amended (1967 Supp), in prohibiting the Sunday sale of certain articles while at the same time permitting the sale of certain other articles, make such vague arbitrary and discriminatory classification as to violate the equal protection clause of the Fourteenth Amendment of the United States Constitution?

Are sections 64-2 through 64-2.5 of the 1962 Code of Laws oof South Carolina, as amended (1967 Supp.), so vague, arbitrary, discriminatory and without rational relationship to the object sought to be accomplished as to violate the due process clause of the Fourteenth Amendment to the United States Constitution?

Are sections 64-2 through 64-2.5 of the 1962 Code of Laws of South Carolina, as amended (1967 Supp.), being administered so arbitrarily and discriminatorily against appellants as to render their administration violative of 42 U. S. C. sec. 1983, and constitute a denial of due process of law and equal protection of the law as guaranteed by the Fourteenth Amendment of the United States Constitution?

STATEMENT

This action was commenced by filing of a complaint dated October 26, 1967, in which the plaintiff-appellants state three causes of action.

In the first cause of action they seek an injunction *pendente lite* and permanently against the respondents from alleged discriminatory enforcement of the Sunday closing laws commonly called the "Blue Laws".

which are contained in Section 64-2, et seq., of the 1962 Code of Laws of South Carolina, upon the grounds that they have been subjected to arrest and harassment while their competitors have not been arrested for similar sales on Sunday over a two-year period prior to institution of this action, in violation of the equal protection of the laws clause of the Fourteenth Amendment to the Constitution of the United States of America.

In the second cause of action in addition to an injunction, appellants seek a declaratory judgment that Section 64-2 through 64-2.5 of the 1962 Code of Laws of South Carolina are unconstitutional because they deny the appellants equal protection of the laws guaranteed under the Fourteenth Amendment of the Constitution of the United States of America because they deprive the appellants of liberty or property without due process of law contrary to the provisions of the Fourteenth Amendment of the Constitution of the United States of America; and for the reason that the sections of the South Carolina Code are unconstitutional under the Eighth and Fourteenth Amendments of the Constitution of the United States of America in that they impose an unusual punishment and thereby deprive the appellants of due process of law.

In the third cause of action appellants seek an injunction against the respondents from discriminatory enforcement of section 64-2 through 64-2.5 of the 1962 Code of Laws of South Carolina in violation of a federal statute (42 U. S. C. 1983) and the Fourteenth Amendment of the Constitution of the United States of America.

A rule to show cause was issued by the Honorable Robert W. Hemphill, United States District Judge,

on October 26, 1967, ex parte, with the explanation that because of the commitment of the court a hearing could not be held on the issuance of a temporary restraining order until November 26, 1967, upon the condition that the defendants might move at anytime upon three (3) days' notice to dissolve the temporary injunction. Thereafter on November 22, 1967, Judge Hemphill continued the temporary injunction upon agreement of the parties that the entire case including permanent injunctive relief be heard by a three-judge court and that the temporary restraining order be continued upon the same terms stated in the order of October 26, 1967. By order of Chief Judge Clement F. Haynsworth, Jr., a three-judge court was constituted in accordance with the provisions of Section 2284, Title 28, United States Code of Laws. Prior to November 22, 1967, respondents were represented by T. Kenneth Summerford, Solicitor of the Twelfth Judicial Circuit. On November 22, 1967, on motion of the Honorable Daniel R. McLeod, Attorney General of South Carolina, who entered an appearance on behalf of the respondents a consent order was issued extending the time within which the respondents might answer or otherwise plead until December 12, 1967. On December 8, 1967, the Attorney General filed a motion to dissolve the temporary restraining order upon various grounds, and an answer was filed on behalf of the appellants on December 12, 1967. The answer states three defenses. The first constitutes a general denial.

The second defense alleges that an action entitled "Whitney Trading Corporation, Plaintiff, versus Robert E. McNair, Governor of South Carolina, J. B. Strom, Chief of South Carolina Law Enforcement Division, E. A. McLeod, Sheriff of Florence County, and T. E. Rogers, Jr., Magistrate, Defendants," now

on appeal to the Supreme Court of South Carolina, raises issues which are identical with those raised in the instant case, the respondents interpose the defense of abstention by the Federal Court pending the appeal and upon its conclusion the defense of *res adjudicata.*

The third defense alleges that Whitney Stores, Inc., has not complied with the laws of the State of South Carolina because it has not received authorization to do business in this state, it is deprived of any right of equitable relief. At a pre-trial conference with Judge Hemphill on December 19, 1967, it was established that Whitney Stores, Inc., is in fact a South Carolina corporation and has complied with the corporate laws of this state. It was agreed between counsel that the testimony would be taken in the form of depositions on December 27, 1967. Pursuant to that agreement depositions were taken on December 27, 1967, and numerous exhibits were received. Appellants had prior to the hearing served notice for admissions and requests for answers to interrogatories upon all of the respondents and the answers of the respondents constitute a part of the record in this case.

Belk's Department Store of Camden, South Carolina, Inc., Collins Department Store, Inc., and South Carolina Retail Council, Inc., filed a motion on January 5, 1968, seeking to intervene upon the ground that the statutes drawn in question vitally affect the future operation of their businesses, and were by order of Judge Hemphill dated January 12, 1968, allowed to intervene for the purpose of making argument before the three-judge court. In the answer of the intervenors, it is alleged that they have insufficient information as to the first and third causes of action and therefore deny same. With regard to the second cause of action, they allege that the classifications estab-

lished by the Sunday closing law are fair and reasonable and comply in all respects with the Constitution of the United States of America; and in any event if they are unconstitutional they are separate and in an external part of the regulatory scheme prohibiting the conduct of business on Sunday, and all other provisions of the South Carolina Sunday closing law are valid and constitutional.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

Initially it must be stated that the court below refused to consider the constitutionality of the statutes in question limiting its decision to a discussion of the jurisdictional issue and other questions raised. The reason for this grew out of the court's interpretation of the decision in *Solomon v. South Carolina*, 382 U. S. 204, 86 S. Ct. 396, 15 L. Ed. (2d) 270, it being felt that the Solomon decision "substantially forecloses the question here of due process or equal protection." (App., infra, p. 8a.)

Solomon v. South Carolina (Ibid.) was an appeal from the Supreme Court of South Carolina following a conviction of Aaron Solomon for violation of the same statutes here in issue. In a per curiam decision the Supreme Court of the United States dismissed the appeal for want of a substantial federal question. However, examination of appellant's Jurisdictional Statement reveals that the sole question presented to this court in the *Solomon* case was "Whether section 64-2 of the 1962 Code of Laws of South Carolina, as amended (1964 Supp.), making it unlawful to engage in work on Sunday and prohibiting the sale, or offering for sale, of certain items on Sunday, violates the constitutional guarantee of free exercise of religion

as set forth in the First Amendment of the United States Constitution, made applicable to the States by the Fourteenth Amendment, when applied to appellant, an observing and practicing Orthodox Jew who, in accordance with the requirements of his religious belief, does not engage in work or labor on Saturday and keeps his place of business closed on Saturday." (Jurisdictional Statement of Appellant, No. 588, October Term, 1965.)

It is evident that only the Sabbatarian issue of Sunday closing laws was considered in dismissing the *Solomon* case for want of a substantial federal question. There is nothing to sustain the view of the court below that the issue of commodity classification as embodied in the South Carolina Sunday Closing Law has received the stamp of approval of the United States Supreme Court.

To be sure, the constitutionality of allowing the sale of certain items on Sunday and prohibiting the sale of others has already been drawn into question before this Court. *McGowan v. Maryland*, 366 U. S. 420, 81 S. Ct. 1101, 6 L. Ed. (2d) 393 (1961; and *Gallagher v. Crown Kosher Super Mkt.*, 366 U. S. 617, 81 S. Ct. 1122, 6 L. Ed. (2d) 536 (1961). State legislatures are given wide discretion in drawing such statutes. Nevertheless, it is recognized that such commodity classification must be reasonably calculated to accomplish the desired purpose of the statute, that being a uniform day of rest. It is also a recognized principle of law that the terms of a penal statute must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties. *Connally v. General Construction Co.*, 269 U. S. 385, 46 S. Ct. 126, 70 L. Ed. 322 (1926). These two aspects of the South Carolina

Sunday Closing Laws have never been examined by this Court. Unlike *McGowan v. Maryland*, supra, the record in this case is not barren, of any indication that the statutory classification of prohibited and permitted items of sale lacks reasonableness. Nor is it possible to resolve the vagueness of the statutes as a matter of ordinary commercial knowledge or by making an investigation at a nearby beach or any other place as was suggested by Mr. Chief Justice Warren in the *McGowan* case, supra.

The statutes in issue have state wide application in South Carolina and accordingly, affect a large number of people. That the issues presented are substantial is amply shown by the intervention of two large department stores located in other communities than that of plaintiffs and by the intervention of the South Carolina Retail Council, Inc., an organization representative of scattered interests.

Appellants' second contention is that the South Carolina Sunday Closing Law is being arbitrarily and discriminatorily enforced against appellants by local law enforcement officials contrary to the Fourteenth Amendment and 42 U. S. C. 1983. That such conduct on the part of local officials in the enforcement of state laws presents a substantial federal question which warrants the attention of this court was long ago disposed of in the celebrated case of *Yick Wo v. Hopkins*, 118 U. S. 356, 6 S. Ct. 1064, 30 L. Ed. 220 (1886).

> In the years long passed a principle was restated thus: "Though the law itself be fair on its face, and impartial in appliance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, mate-

rial to their rights, the denial of equal justice is still within the prohibition of the Constitution."

Respondents' answers to interrogatories and requests for admissions clearly show they had knowledge that the South Carolina Sunday Closing Law was being violated by appellants' competitors throughout the period during which plaintiffs were being harassed with criminal arrests and attempts to close their business by force of injunction. The record also reveals that despite this knowledge by defendants only the plaintiffs have been pursued under these laws in Florence County, South Carolina. The conclusion seems clear that such law enforcement is the "intentional or purposeful discrimination" that is declared to be unconstitutional in *Snowden v. Hughes*, 321 U. S. 1, 64 S. Ct. 397 (1944).

CONCLUSION

The questions presented on this appeal (supra p. 5) are substantial federal questions, and the Court should enter an order noting probable jurisdiction and setting the case for briefing and hearing on the merits.

Respectfully submitted.

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Attorney for Appellants

May, 1968

APPENDIX

APPENDIX

UNITED STATES DISTRICT COURT
For the District of South Carolina
Florence Division

Civil Action File No. 67-771

Whitney Stores, Inc., and Robert H. Johnson

versus

T. Kenneth Summerford, Solicitor for the Twelfth Judicial Circuit of the State of South Carolina, E. A. McLeod, Sheriff of Florence County, and T. E. Rogers, Jr., Magistrate

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JUDGMENT

This action came on for hearing before the Court, Honorable Clement F. Haynsworth, Jr., Chief Judge, Fourth Circuit Court of Appeals, Honorable Robert W. Hemphill, and Hon. Donald Russell, United States District Judges, presiding, and the issues having been duly heard and a decision having been duly rendered,

It is Ordered and Adjudged that the temporary injunction/restraining order heretofore issue is dissolved. The issues pending before this panel are dissolved and the cause dismissed.

Dated at Columbia, South Carolina, this 12th day of February, 1968.

MILLER C. FOSTER, JR.
Clerk of Court
By: Lorraine Waterfall, Deputy

IN THE DISTRICT COURT OF THE UNITED STATES
For the District of South Carolina
Florence Division

Civil Action No. 67-771

Whitney Stores, Inc., and Robert H. Johnson,
Plaintiffs

versus

T. Kenneth Summerford, Solicitor for the Twelfth Judicial Circuit of the State of South Carolina, E. A. McLeod, Sheriff of Florence County, and T. E. Rogers, Jr., Magistrate,
Defendants

and

Belk's Department Store of Camden, South Carolina, Inc., Collins Department Stores, Inc., and South Carolina Retail Council, Inc.,
Intervenor-Defendants

Before Haynsworth, Chief Judge, Fourth Judicial Circuit of the United States, Hemphill and Russell, United States District Judges.

(Argued January 23, 1968 Decided ——)

Eugene N. Zeigler, Esquire, Florence, S. C., for plaintiffs, Daniel R. McLeod, Esquire, Attorney General, State of South Carolina, and Everett N.

Brandon, Esquire, Assistant Attorney General, State of South Carolina, Columbia, S. C., for defendants. David M. McConnell, Esquire, Charlotte, N. C., and David W. Robinson, II, Esquire, of Columbia, S. C., for the intervenor-defendants.

HEMPHILL, Robert W., District Judge

Plaintiffs,[1] insisting that Sections 64-2 through 64-2.5[2] of the South Carolina Code of Laws, as amended, are unconstitutional, ask a declaratory judgment of such in this court. They further seek judgment that a pattern of discriminatory enforcement exists, and position that the unconstitutional application and enforcement invite and deserve injunctive relief. As to plaintiffs' contentions of the unconstitutionality of the statutes, in themselves, this court does not agree. The district court will examine the facts bearing on discriminatory enforcement.

Complaint initiating this action was filed on October 26, 1967. Plaintiffs pitched on three alleged separate and distinct causes of actions revolving around the South Carolina closing law[3] more commonly referred to as the "Blue Laws."

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[1] Johnson is an administrative employee of Whitney Stores, Inc.

[2] Commonly designated "Sunday Blue Laws."

[3] S. C. Code Ann. § 64-1 et seq. (1962) is as follows: § 64-1. Public sports prohibited on Sunday; exception. § 64-1.1. Same; Dillon County exempted.—Notwithstanding any other provision of law to the contrary, Dillon County shall be exempt from the provisions of § 64-1, which prohibits certain public sports on Sunday. (1963 (53) 154.)

§ 64-2. Unlawful to work on Sunday—On the first day of the week, commonly called Sunday, it shall be unlawful for any person to engage in worldly work, labor, business of his ordinary calling or the selling or offering to sell, publicly or privately or by telephone, at retail or at wholesale to the consumer any goods, wares or merchandise or to employ others to engage in work, labor, busi-

In their first cause of action plaintiffs seek an injunction *pendente lite* and permanently. They as-

ness or selling or offering to sell any goods, wares or merchandise, excepting work of necessity or charity. (1952 Code § 64-2; 1942 Code § 1732; 1932 Code § 1732; Cr. C. '22 § 713; Cr. C. '12 § 698; Cr. C. '02 § 500; G. S. 1631; R. S. 385; 1691 (2) 69; 1712 (2) 396; 1962 (52) 2134.)

§ 64-2.1. Exceptions to §64-2.—Section 64-2 shall not apply to the following: The operation of radio or television stations nor to the publication and distribution of newspapers, nor to the sale of newspapers, books and magazines; nor to the sale or delivery of heating, cooling, refrigerating or motor fuels, oils or gases or the installation of repair parts or accessories for immediate use in connection with motor vehicles, boats, aircrafts or heating, cooling or refrigerating systems; nor to transportation by air, land or water of persons or property; nor to public utilities or sales usual or incidental thereto; nor to the operation of public lodging or eating places (including food caterers) nor to the sale of emergency food needs at open air markets and grocery stores which do not employ more than three persons including the owners or proprietors at any one time; nor to the sale of drugs, medicines, surgical or medical aids, supplies and equipment, or to the sale of cosmetics, toilet aritcles, or personal health or hygiene supplies and aids; nor to the sale of flowers, plants, seeds and shrubs; nor to the sale of prepared tobaccos, soft drinks, confections, ice creams, ices, novelties, souvenirs, fish bait or swimwear, nor to any farming operations necessary for the preservation of agricultural commodities. (1962 (52) 2134.)

§ 64-2.2. Sales of certain items on Sunday prohibited.—The sale or offer to sell of the following items on Sunday is prohibited: Clothing and clothing accessories (except those which qualify as swimwear, novelties or souvenirs); housewares, china, glassware and kitchenware; home, business and office furnishings and appliances; tools, paints, hardware, building supplies and lumber; jewelry, silverware, watches, clocks, cameras (but not including films, batteries and flashbulbs); luggage, musical instruments, recorders, recordings, radios, television sets, phonographs, record players or so-called hi-fi or stereo sets or equipment; sporting goods (except when sold on premises where sporting events and recreational facilities are permitted); yard or piece goods; automobiles, trucks and trailers. No inference shall arise from the foregoing enumeration that either the sale or the offering for sale on Sunday of items or articles not mentioned is permitted. (1962 (52) 2134.)

§ 64-2.3. Penalties for violation of § 64-2.—A violation of any of the provisions of § 64-2 shall be punished by a fine of not less than fifty dollars nor more than two hundred fifty dollars in the

sert that the defendants have subjected Whitney's employees to arrest and harrassment; and that at the

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case of the first offense, and by a fine of not less than one hundred dollars nor more than five hundred dollars for each and every subsequent offense. Each separate sale, offer or attempt to sell on Sunday, and each Sunday a person is engaged in other work, labor or business in violation of § 64-2, or employs others to be so engaged, shall constitute a separate offense. (1962 (52.)

§ 64-2.4. Sunday work declared nuisance; injunction; time off to attend church.—The doing of any worldly work or labor, business of his ordinary calling, or the selling or offering for sale of any goods, wares or merchandise contrary to § 64-2 is declared to be a public nuisance and any State, county or municipal law-enforcement officer may apply to any court of competent jurisdiction for and may obtain an injunction restraining such operation, work, labor, sale or offering for sale. PROVIDED, that an employee in a retail store where there are more than three employees shall upon request of said employee be granted time off to attend service allowing one hour for preparing to go and traveling to church and one hour after service for returning therefrom. (1962 (52) 2134.)

§ 64-2.5. Sections 64-2 to 64-2.4 not to affect certain businesses. —The provisions of §§ 64-2 to 64-2.4 shall not be applicable to or affect the carrying on of any business or the rendering of any service which was lawful on April 7, 1962. (1962 (52) 2134.)

§ 64-4. Employment in textile plants on Sunday.

§64-5. Employment of children or women in mercantile or manufacturing establishments on Sunday.

§ 64-6. Exceptions for manufacturing plants requiring continuous operation.—The provisions of §§ 64-2 through 64-5 shall not apply to manufacturing establishments or employees thereof when such establishments in the nature of their business involve manufacturing processes requiring, of necessity, for a normal production schedule continuous and uninterrupted operation. In such industries a work week in excess of forty hours and a workday in excess of eight hours shall not be permissible except when the provisions of the Fair Labor Standards Act are complied with. The exemption herein provided shall not apply to or affect cotton, woolen, or worsted manufacturing, finishing, dyeing, printing or processing plants and such plants and industries shall be controlled by § 64-4. (1952 Code § 64-6; 1950 (46) 2260; 1966 (54) 2182.)

§ 64-7. Manufacturing of bakery products defined.—For the purpose of this chapter, the *"manufacturing of bakery products"* is defined as being a chemical manufacturing process requiring continuous, uninterrupted operation. (1963 (53) 165.)

same time violations and enforcement have been overlooked against the competitors of the plaintiffs. Such action, plaintiffs claim, violate the equal protection of the laws clause of the Fourteenth Amendment to the Constitution of the United States of America. In the second cause of action, relief is sought on grounds that the Sunday closing laws are unconstitutional because the language is too vague and indefinite; further, that the fines for violations are so severe as to constitute cruel and unusual punishment, in violation of the Eighth and Fourteenth Amendments. A third cause of action seeks to enjoin alleged discriminatory enforcement as in violation of Civil Rights statute 1983[4] of Title 42, U. S. Code, and the Fourteenth Amendment.

Defendants Kenneth Summeford and others entered a general denial, pled the doctrine of abstention and alleged the plaintiff was not properly constituted to do business in this state. On January 12, 1968, Belk's Department Store of Camden, South Carolina, Inc., Collins Department Store, Inc., and South Carolina Retail Council, Inc., were allowed to intervene as defendants. They pled, additionally, that if § 64-2.1 and 64-2.2 are unconstitutional they are separate and not essential to the regulatory scheme prohibiting conduct of business on Sunday.

A temporary restraining order of October 26, 1967, was continued until the entire matter, includ-

[4] The language of 42 U. S. C. A. 1983 is as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

ing permanent injunctive relief, could be heard by a proper tribunal. A three-judge panel was then designated by Chief Judge Clement F. Haynsworth, Jr., of the United States Fourth Circuit Court of Appeals, in accordance with 28 U. S. C. A. 2284. Arguments were scheduled for Greenville, South Carolina.

We first consider jurisdiction. Plaintiffs assert jurisdiction on grounds that the South Carolina Blue Laws are unconstitutional because of vagueness in classification of goods which can legally be sold on Sunday and vagueness of the statutory terms "souvenirs and novelties."[5] Plaintiffs also contend that the statutory provisions "works of necessity"[6] are unconstitutionally vague and indefinite.

The statute requiring decision of a three-judge district court is to be strictly and narrowly construed, *Phillips v. United States*, 312 U. S. 246, 85 L. Ed. 800, 61 S. Ct. 480, and it is elementary that the statute comes into play only when an injunction is brought to enjoin the enforcement of an unconstitutionally drawn statute. *Bailey v. Patterson*, 369 U. S. 31, 82 S. Ct. 549, 7 L. Ed. (2d) 512. Once a three-judge court panel has determined that no substantial federal question is involved the three-judge panel no longer has jurisdiction. *Two Guys from Harrison-Allentown, Inc., v. McGinley*, 179 F. Supp. 944 *aff'd* 366 U. S. 582, 81 S. Ct. 1135, 6 L. Ed. (2d) 551 (D. C. E. D. Pa. 1959).

Soon after the passage of the act in question, a prosecution in another but similar case was commenced. A conviction was secured, and the case was appealed to the Supreme Court of South Carolina, which affirmed, *State v. Solomon*, 245 S. C. 550, 141

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[5] S. C. Code Ann. § 64-2.1, *supra*.

[6] S. C. Code 64.2.

S. E. (2d) 818, primarily on the basis of *McGowan v. Maryland*, 366 U. S. 420, 81 S. Ct. 1101, 6 L. Ed. (2d) 393 (1961); *Two Guys from Harrison-Allentown, Inc. v. McGinley*, 366 U. S. 582, 81 S. Ct. 1135, 6 L. Ed. (2d) 551 (1961); *Braunfeld v. Brown*, 366 U. S. 599, 81 S. Ct. 1144, 6 L. Ed. (2d) 563 (1961); and *Gallagher v. Crown Kosher Super Mkt.*, 366 U. S. 617, 81 S. Ct. 1122, 6 L. Ed. (2d) 536 (1961). An appeal to the Supreme Court of the United States was dismissed, 382 U. S. 204, 86 S. Ct. 396, 15 L. Ed. (2d) 270, for want of a substantial federal question.

The decision of the Supreme Court of South Carolina held the act to be unassailable on state or federal grounds, and specifically held it not to be in violation of the due process or the equal protection clauses of the Fourteenth Amendment. The effect of the Supreme Court's dismissal of the appeal from the Supreme Court of South Carolina, on the ground that there was no substantial federal question, was tantamount to an adjudication upon the merits. *Beck v. McLeod*, 240 F. Supp. 708 (D. C. S. C. 1965), judgment affirmed, 382 U. S. 454, 86 S. Ct. 645, 15 L. Ed. (2d) 522. As such, it substantially forecloses the question here of due process or equal protection.

Specifically, the court held that the term "work of necessity"[7] met the constitutional standards. The court further held that "necessity" is necessarily an elastic term because of various factors which must be considered in determining the question. The court held that "work of necessity" . . . "means labor reasonably necessary for the worker to perform to save himself from unforeseen or irreparable injury or loss or necessary for the welfare of community in which he resides, viewed in the light of the facts and

[7] S. C. Code 64.2.

circumstances existing at that time. It does not mean that which is indispensable, but it means something more than that which is merely needful or desirable."[8] *Solomon, supra,* at 829.

The problem of defining "novelties and souvenirs"[9] has also been settled. The South Carolina court stated that "'[n]ovelties' and 'souvenirs' are terms of common usage in the business world and business people of ordinary intelligence in the position of the defendant would be able to know what exceptions are meant by the terms, either as a matter of ordinary commercial knowledge or upon reasonable investigation. Under such circumstances there is no need to guess at the statute's meaning in order to determine what conduct it makes criminal."

Plaintiffs seek to avoid the mandate of this decision by stating that the factual basis was not sufficiently developed in the *Solomon case,* supra, to formulate a proper definition of the alleged vague terms of the statute. They contend that there has been a further factual development and since the definition of the terms is necessarily a factual matter the South Carolina Supreme Court did not have, at the time it decided the *Solomon* case, *supra,* a sufficient factual basis on which to base its decision.

While this three-judge court is not bound by a state court decision that a state statute is constitutional, *Goesaert v. Cleary,* 74 F. Supp 735 (D. C. Mich. 1947) *aff'd* 69 S. Ct. 198, 334 U. S. 464, 93 L. Ed. 163, the

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[8] The plaintiff argued that goods of necessity was a subjective test and what was necessary for one person may not be necessary for another making the statute vague. It must be noted, however, that the statute does not talk of goods of necessity but of *works of necessity.* [Emphasis added.]

[9] S. C. Code Ann. 64-2.1, *supra.*

Supreme Court's dismissal of the appeal in *Solomon* because it was found to present no substantial federal question is a decision on the merits by the Supreme Court of the United States, which is binding upon us. *Beck v. McLeod, supra.* That adjudication forecloses any contention that the South Carolina statute is so facially vague or indefinite as to make it constitutionally infirm. The record in this case does not alter that view. The attack is centered upon the terms "novelties" and "souvenirs," but the showing here is entirely consistent with the assumptions in *Solomon.* Each is a term familiar to merchants and employed by them to describe recognizable classifications of goods. While there may be some peripheral questions as to the outer reach of either term, they are the terms of the trade, and there is no hint of a suggestion that either term could embrace the great variety of wearing apparel and most of the other hard and soft goods which the plaintiffs offer for sale in their store, the sale of which is economically essential to their Sunday operation.

Plaintiffs attack the penalty imposed in Section 64-2.3 as constituting cruel and unsual punishment and therefore being unconstitutional under the Eighth Amendment to the Constitution of the United States. While it is recognized that fines may constitute cruel and unusual punishment within the prohibition of the Eighth Amendment, *United States v. Schechter*, 8 F. Supp. 136 (E. D. N. Y. 1934); *Oak Mfg. Co. v. United States*, 193 F. Supp. 514 (N. D. Ill. 1961); *O'Malley v. United States*, 227 F. (2d) 332, cert. den. 76 S. Ct. 434, 350 U. S. 966, 100 L. Ed. 838, this statutory fine clearly does not fall within the prohibition. A substantial fine is necessary in situations of this nature in order to prevent businesses from operating at a large profit and paying a small fine. It makes no dif-

ference that repeated violations results in higher fines; such would be the fault of the owner of the business, not of the statute. The plaintiffs' challenge on these grounds is patently without merit.

Having reached the conclusion that no substantial federal question as to the constitutionality of the Blue Laws exists here, we survey the issue of discriminatory enforcement or application. If substantial issues of fact were present in the record, or more testimony were desired or offered, this court would resolve itself into a court of one judge to make the necessary determination thereon. *Two Guys from Harriston-Allentown, Inc. v. McGinley*, 266 F. (2d) 424, 432 (3rd Cir. 1959); *Gully v. Interstate Natural Gas*, 292 U. S. 16, 54 S. Ct. 565, 78 L. Ed. 1088; *Nelson v. Jessup*, 134 F. Supp. 218 (D. C. S. D. Ind. 1955); *Farmers Gin Co. v. Hayes*, 54 F. Supp. 43 (D. C. W. D. Okla. 1943). Such collateral matters are, under stated circumstances, properly relinquished to the district judge to whom original petition was presented in this case. *Miller v. Smith*, 236 F. Supp. 927 (E. D. Pa. 1965); *Ford v. Atty Gen'l of Pa.*, 184 F. Supp. 189, *aff'd* 5 L. Ed. 39, 81 S. Ct. 65, 364 U. S. 291 (E. D. Pa. 1960).

Our examination of the record reveals no case of discriminatory enforcement. Solicitor Summerford testified he had brought to his attention two violations of the Sunday Blue Laws, that of plaintiffs and that of Eckerd's Drug Store. He had Sheriff McLeod check both complaints: the Sheriff found no violations at Eckerd's. There is no evidence both were not subjected to the same surveillance. There is insufficient evidence in the record to support the charge of discriminatory application.

Plaintiffs further claim a denial of equal protection of the laws under the Fourteenth Amendment to

the Constitution, and seek shelter under the protective umbrella of 42 U. S. C. 1983. The record here warrants no such conclusion on our part. To show that unequal administration of a state statute offends the equal protection clause one must show an intentional or purposeful discrimination. *Snowden v. Hughes*, 321 U. S. 1, 8, 64 S. Ct. 397 (1944).[6] The testimony in this case fails to show the necessary intent or purpose in the enforcement of the Blue Laws as to plaintiffs.

Insofar as this court is concerned the temporary injunction/restraining order heretofore issued is dissolved. The issues pending before this panel are dissolved and the cause dismissed.

The Clerk will enter judgment accordingly.

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[6] See also *Moss v. Hornig*, (2nd Cir. 1963), 314 F. (2d) 89; *Oyler v. Bowles*, 368 U. S. 448, 456, 82 S. Ct. 501, 505, 7 L. Ed. (2d) 446 (1962).

SUPREME COURT OF THE UNITED STATES

October Term, 1968.

WHITNEY STORES, INC., ET AL. *v.*
SUMMERFORD ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA.

No. 85. Decided October 14, 1968.

PER CURIAM.

The judgment is affirmed.